

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF SOUTHFIELD,

Plaintiff-Appellant,

v

THAMER SESI, GHASSAN SESI, and MADISON
NATIONAL BANK,

Defendants-Appellees.

UNPUBLISHED

October 3, 2000

No. 212004

Oakland Circuit Court

LC No. 97-550107-CC

Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Plaintiff appeals by right the dismissal of its complaint seeking condemnation by eminent domain of a parcel of land owned by defendants. Defendants stipulated below that they did not challenge the necessity of plaintiff's proposed district entry beautification project, but argued that the taking was excessive. The trial court agreed. We reverse.

First, plaintiff claims that the trial court improperly shifted the burden of proof. We disagree. In a condemnation action, the plaintiff's resolution of necessity is prima facie evidence of necessity and fulfills the plaintiff's initial burden of proof. *Nelson Drainage District v Filippis*, 174 Mich App 400, 408; 436 NW2d 682 (1989). The burden is then on the defendant to come forward with evidence to support its claim that the plaintiff abused its discretion. *Id.* While the plaintiff is not obligated to respond, this Court has found that if the plaintiff does not respond to the defendant's proofs, then the trial court may properly determine that the plaintiff "failed to maintain a record to support the presumption of necessity." *Id.* at 408-409. In this case, the trial court correctly cited this burden of proof in its conclusions of law. The trial court did, in fact, say in its opinion and order that plaintiff "failed to satisfy its burden to demonstrate that all of Defendants' property was necessary." However, it is apparent from the other findings and conclusions of the trial court, and the cases cited by the trial court, that it properly understood the parties' respective burdens.

Next, plaintiff claims that it had great discretion to determine how much property it could take for its project, and that defendants failed to present sufficient proof to overrule its determination of necessity. We agree. This Court will not reverse the findings and conclusions of the trial court in a

condemnation action unless they are clearly erroneous. *City of Troy v Barnard*, 183 Mich App 565, 569; 455 NW2d 378 (1990). Plaintiff's determination of public necessity is binding on the courts, however, and will not be disturbed absent "a showing of fraud, error of law, or abuse of discretion." *Id.*; MCL 213.56(2); MSA 8.265(6)(2). There can be no judicial review of the decision to make an improvement, but the courts may review the necessity of using all or some of the property involved by considering whether the land in question is reasonably suitable and necessary for the contemplated project. *Barnard, supra* at 569.

In this case, defendants acknowledged by stipulation the necessity of the project for which defendants' property is intended and only challenged the amount of land being taken. Prior to beginning the condemnation process, plaintiff adopted a plan which fully utilizes defendants' .63 acre parcel. The only consideration is whether the project needs the amount of property involved, *Filippis, supra* at 406, and there is no indication here that plaintiff is attempting to acquire more property than is needed for the proposed improvement. The fact that plaintiff considered other, less extensive options before adopting the Albert Kahn image gateway design plan is irrelevant. The fact that defendants would have preferred a different plan is also irrelevant. There is no evidence of fraud, error of law or abuse of discretion, and no support for a finding of "excess" condemnation. *Id.*

Reversed.

/s/ Jane E. Markey
/s/ Roman S. Gibbs
/s/ Richard Allen Griffin